APPEAL NO. 93138

A contested case hearing was held on April 7, 1992, in (city), Texas, (hearing officer) presiding as hearing officer. The record was kept open pursuant to a request of the appellant's (claimant) counsel for the purpose of obtaining additional medical records including those from an upcoming medical procedure to be performed on the claimant. Although the hearing record indicates that another hearing date was tentatively scheduled for May 29, 1992, there is nothing to indicate that anything transpired until the hearing officer signed his Decision and Order on January 27, 1993. He does indicate that "claimant and carrier have agreed to close the hearing without offering additional evidence" and it was closed the date the hearing officer signed his Decision And Order. The hearing officer found that the claimant sustained "an injury to his lungs from breathing chemical fumes while working" for the employer and concluded that the claimant sustained a compensable injury to his lungs in the course and scope of his employment. Accordingly, he ordered that the claimant was entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), and that temporary income benefits will be paid "if it has been established or he can establish that he had disability eight or more days." Appellant (carrier) urges that the finding and conclusion of the hearing officer are against the great weight and preponderance of the evidence and asks that the decision be reversed and that we render a new decision. Claimant argues that there is sufficient evidence to support the decision of the hearing office and asks that decision be affirmed.

DECISION

Not being able to conclude that the great weight and preponderance of the evidence is so against the hearing officer's decision as to be clearly wrong or manifestly unjust, we affirm, while noting that different inferences than those drawn by the hearing officer might well have reasonably been drawn from the evidence in this case. *See* Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.)

The claimant, a 64-year-old electrician by trade, asserts that he was injured at work on (date of injury), when he smelled gas for about 10 seconds where he was working out in the open. He was working at a chemical plant at the time and indicated he had smelled many chemicals in the past but did not know what he smelled on August 26th. He testified that he lost most of his breathing capacity, lost most of his speech for a while, and has not been able to work since. He states the smell was similar to "rotten eggs." The day in question was relatively hot and the wind was blowing. He claims the incident occurred during the afternoon break and there were others present in the vicinity. He testified that after he smelled the gas he did not feel well, went to a break area, and did not work the remainder of the day. After work, he went home and stated that he was having difficulty breathing. After he got home he had his wife fix him a whiskey drink, he went to change his clothes and that's the last he remembers until he woke up in intensive care in the VA hospital the next day. He does not remember telling anyone at the hospital that he was exposed to hydrogen sulfide gas. The claimant's wife testified that he told her when he got

home that he had been "gassed" that day. The claimant acknowledged he has had previous problems involving bronchial pneumonia. He claimed that although he had been a smoker in the past, for some time now he only occasionally had a cigarette. He also stated he was unaware of having a prior heart attack or condition, although this was indicated on the VA hospital medical records. He testified that he was scheduled to have some "burnt tissue" removed from a vocal cord in the near future.

Coworkers of the claimant indicated that normally there were odors around the chemical plant and that there was nothing out of the ordinary that particular day. One coworker did briefly smell an odor or gas that the claimant referred to during an afternoon break. None of the other employees experienced any problems with fume inhalation on August 26th. One of the coworkers described the claimant as still smoking a pack of cigarettes a day, and another stated that the claimant worked right up to the end of the day. None of the coworkers indicated that the claimant looked sick or mentioned being ill to them during the day, although one stated the claimant appeared to be "dragging" at the end of the day.

The operations plant engineer for the chemical company testified that there were no indications of a chemical release or spill on August 26th, and that there are sensors in various locations to warn of chemical releases; however, he could not rule out the possibility of a leak occurring at any given time. He stated the chemical tanks in the area, which had been used for benzyl mercaptan, had been washed down some time in June in preparation for another product and that if there was any mercaptan there, it would only be residual. He stated he had been exposed to benzyl mercaptan in the past and had never known of anyone so exposed to lose consciousness.

The safety inspector for the employer testified that if a chemical exposure or leak occurs that affects any of the employer's employees, it is to be reported to him. He stated that he could not remember any such chemical leak, gas leak, chemical spill or any type of exposure to an employee during the month of August 1991; however, he may have indicated to hospital personnel who called the plant on the evening of August 26th that there had been a mercaptan leak. This was based upon others telling him they may have smelled something similar to mercaptan and not on any report or investigation.

The medical summary from the VA hospital indicates a diagnosis of: "(1) acute respiratory distress, etiology unclear; (2) history of exposure to industrial fumes, no definite identification could be made of the industrial fumes." The report also indicates that the claimant's blood/alcohol level was .082 and that other laboratory results were basically normal. The report further indicates that contact with the employer disclosed that there was a leak of mercaptan, that a number of other employees were not affected, and that the claimant had been feeling weak and sweaty earlier in the day and before the exposure. The report also states that the claimant was examined by consultation, that his vocal cords

were normal, and that "it was thought by the ENT consultation that [claimant]'s inability to verbalize might have been because of hysterical aphonia." The claimant was advised that he might have had exposure to other unknown industrial toxins but that "we could not find any permanent effects from this exposure and that the patient's EKG as well as blood tests and arterial blood gases have shown satisfactory results." Without a medical release, the claimant left the VA hospital on August 29, 1991, indicating he did not have much faith in the diagnosis.

A medical report dated February 11, 1992, rendered by a Dr. S who reviewed the medical records in this case, contains the following excerpts:

> I have reviewed the charts at length that you sent me on February 7th, 1992. I will say that from all the records that I read, this patient could have had some inhalation problem, but your questions were "was he exposed to hydrogen sulfide?" The other employees said there was an exposure to Mercaptan fumes, and I am not privy to what is in that particular product.
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> This patient did not act like hydrogen sulfide poisoning patient. He did have some chest problems, but chest X-rays were negative. His blood oxygen levels and PH were normal on admission. He had EKG changes of an old cardiac myocardial infarct on his X-ray, which were unchanged from several months before his present admission, on 8/91. Then, he signed himself out from the hospital. All liver functions, SMAC-20's and other tests were normal.
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> . . . I believe this patient had a pre-existing condition, probably myocardial ischemia, secondary to his age and previous heart damage, coronary vascular disease; I do not know from these files if he was a smoker, that would certainly help myocardial ischemia, but the ethanol on board would certainly make the myocardial ischemia worse, and he also blamed the VA hospital for giving him aspirin, and saying that it caused stomach upset. This could have caused some of his stomach discomfort. Whatever fumes he had would have made any myocardial ischemia worse. However, he did not suffer permanent damage from the fumes, based on the hospital findings and the ENT consultant.

The carrier introduced a Material Safety Data Sheet on the chemical benzyl mercaptan which shows acute effects of overexposure by inhalation to include "slight irritation, nausea, headache, unconsciousness, tremors possible, convulsions, respiratory paralysis, death." Recommended exposure limits are stated as not having been

established.

The hearing officer's cryptic, minimal finding of fact in this case states the claimant sustained "an injury to his lungs from breathing chemical fumes. . . ." In view of the medical evidence, which indicates that pertinent tests results were normal and that there is no permanent damage to the claimant's lungs, we can only infer that the injury referred to is the "acute respiratory distress" shown in the diagnosis from the VA hospital medical records. Of course, by definition an injury "means damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm." Article 8308-1.03(27). We do not rule out that, under the particular circumstances of this case, there is evidence to establish a work-related "injury." *See* Texas Workers' Compensation Commission Appeal No. 92200, decided July 2, 1992. *Compare* Texas Workers' Compensation Commission Appeal No. 92427, decided September 23, 1992; Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992; Texas Workers' Compensation Commission Appeal No. 92178, decided June 17, 1992; Texas Workers' Compensation Commission Appeal No. 92202, decided July 6, 1992.

We have repeatedly held that absent a determination that a hearing officer's decision is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, and there is sufficient evidence to support his decision, we have no sound basis to disturb it. Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992; Texas Workers' Compensation Commission Appeal No. 92234, decided August 13, 1992. The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308-6.34(e). While there were conflicts in the evidence and a number of inconsistencies in the testimony, it is the hearing officer's responsibility to resolve these matters. *See* Garza V. Commercial Insurance Co. of Newark, N. J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). He may believe all, part or none of the testimony of any witness (Taylor V. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.)) and may believe the testimony of a claimant, an interested party, such testimony doing no more than raising a fact issue for the hearing officer. Highlands Insurance Company v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). From the evidence, albeit in considerable conflict, the hearing officer could determine that there was some release of the chemical called benzyl mercaptan, that the claimant (as corroborated by one other employee) was exposed to it for a very brief period, that the claimant subsequently suffered difficulty in breathing, nausea, dizziness, speech problems and a degree of unconsciousness, that he was in good condition prior to the exposure, that he was diagnosed that evening with "acute respiratory distress" resulting from the exposure, and that this amounted to the claimant sustaining an "injury" to his lungs from breathing chemical fumes in the course and scope of employment.

We can not say that his decision was so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust or that there is not sufficient evidence to support his decision. Therefore, we affirm.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge